No. 12,271

In the United States Court of Appeals for the Ninth Circuit

LEWIS FRED PENWELL AND SUSANNAH W. PENWELL, EXECUTOR AND EXECUTRIX OF THE ESTATE OF LEWIS PENWELL, FORMERLY COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MONTANA, DECEASED, APPELLANTS

v.

JOHN N. NEWLAND, JAMES TULLIS, GEORGE I. MARTIN, AND BUTTE EXECUTIVES CLUB, A NONPROFIT UNINCORPORATED ASSOCIATION, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

PETITION OF THE APPELLANTS FOR REHEARING

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CITATIONS

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To the Honorable United States Court of Appeals for the Ninth Circuit and to the Judges Thereof:

Come now the appellants, Lewis Fred Penwell and Susannah W. Penwell, and in accordance with Rule 25 of this Court present their petition for rehearing.

On January 19, 1950, this Court dismissed the Government's appeal in this case because of a putative failure to file a valid notice of appeal and vest this Court with jurisdiction. The alleged fatal defect was that the notice of appeal had been taken in the name of the original party defendant, Lewis Penwell, Collector of Internal Revenue, rather than in the names of the sub-

stituted parties defendant, Lewis Fred Penwell and Susannah W. Penwell, against whom the judgment was entered below.

This Court's decision places a construction on Rule 73 of the Federal Rules of Civil Procedure wholly unwarranted by prior decisions and clearly dissonant with the intent and purpose of the Rules. A notice of appeal is to be construed liberally. *Martin* v. *Clarke,* 105 F. 2d 685 (C. A. 7th); *Title Guaranty & Trust Co.* v. *Lester,* 216 Cal. 273. Its purpose is merely to advise the opposite party of an appeal from a particular judgment (*Martin* v. *Clarke, supra*), and if this requirement is met and the parties are not misled, an error which does not go to the fundamental or substantive rights of the parties should be disregarded (*DeSanta* v. *Nehi Corp.,* 171 F. 2d 696 (C. A. 2d); *Dawson* v. *McWilliams,* 146 F. 2d 38 (C. A. 5th)). As Justice Douglas said in *Reconstruction Finance Corp.* v. *Prudence Group,* 311 U. S. 579, 583:

> The court has discretion, where the scope of review is not affected, to disregard such an [procedural] irregularity in the interests of substantial justice. * * *

Furthermore, the Courts of Appeals have been admonished by Rule 61 of the Federal Rules of Civil Procedure to disregard harmless error. *Commercial Banking Corp.* v. *Martel,* 123 F. 2d 846, 847 (C. A. 2d); *University City, Mo.* v. *Home Fire & Marine Ins. Co.,* 114 F. 2d 288, 295 (C. A. 8th). Consonant with the rationale of these cases and the spirit of the Rules, it has even been held that the failure to file any notice of appeal at all is not fatal, if the fundamental rights of the parties are not prejudiced. *Crump* v. *Hill,* 104 F. 2d 36 (C. A. 5th). See also *Federal Deposit Ins. Corp.* v. *Congregation Poiley Tzedeck,* 159 F. 2d 163 (C. A. 2d); *In Re Barnett,* 124 F. 2d 1005 (C. A. 2d).

A court should be loathe to deny any party a hearing on the merits merely because of procedural irregularities. The very purpose of the Federal Rules of Civil Procedure as evidenced by the liberal construction given them by the Courts is to do away with rules of procedure as expedients for winning the game of litigation and to seek instead the adjudication of rights on the merits. As Judge Frank said in *In Re Barnett*, *supra* (p. 1011):

> * * * there has developed, inter alia, the doctrine of "harmless error", which, to the chagrin of those devoted to a conception of litigation as a game of skill, has led to a marked reduction of reversals based upon procedural errors which do no real harm.

Rule 73 provides for the filing of a notice of appeal, the purpose of which is merely to advise the opposite party of an appeal from a particular judgment. It was never intended that assiduous adherence to the literal and formal dictates of the Rule be required, under penalty of a denial of substantive justice for nonprejudicial error. But such is the result of this Court's decision, for the Government has been denied a hearing on the merits, although the purpose of the notice of appeal has been fully effectuated, i. e., the appellees were fully aware of the judgment from which appeal was taken; they were not misled nor have they been prejudiced in any of their fundamental rights. This is fully borne out by the appellees' failure to challenge the validity of the notice of appeal until after the Government had expended time and money to file a record and brief in this Court. It was not in fact until appellees themselves had filed a brief on the merits that they raised the question of this Court's jurisdiction to hear the controversy.

This is not a case where the appeal was taken in the

name of someone completely foreign to the proceedings below, but rather it was taken in the name of the original party defendant to the suit, a party with whom appellees were familiar. It has been held that the taking of an appeal in the name of an original rather than a substituted party does not render the notice fatally defective. *Bullock* v. *Electric Supply Co.,* 227 Mo. App. 1010. Moreover, the notice of appeal in all other respects correctly identified the judgment from which appeal was taken. It was signed by the attorneys representing defendants below; it was filed in the court in which the case was tried; and it was served on the attorneys representing plaintiffs below. Cf. *Herrlich* v. *McDonald,* 72 Cal. 579.

The effect of the decision of this Court is to adjudicate the Government's substantive rights on the basis of a technical procedural defect, despite the fact it was but harmless error. Such a decision is not consonant with the spirit and purpose of the Federal Rules of Civil Procedure. It is in the words of Judge Hutcheson in *Crump* v. *Hill, supra,* p. 38:

> * * * a harking back to the formalistic rigorism of an earlier and outmoded time, as well as a travesty upon justice, to hold that the extremely simple procedure required by the Rule [73] is itself a kind of Mumbo Jumbo, and that the failure to comply formalistically with it defeats substantial rights.

The penalty exacted by this Court is too great a price to pay for a mere clerical misprision which does not mislead or prejudice, nor deny fundamental rights. Mere harmless error in a notice of appeal which complies with the spirit of the Rules should not be held to deprive a party of the right to be heard on the merits.

Wherefore, in view of the foregoing the appellants respectfully pray that their petition for rehearing be

granted and that this Court's order of January 19, 1950, dismissing the Government's appeal be set aside, and that this Court grant a hearing of the case on the merits.

Respectfully submitted,

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FEBRUARY, 1950

CERTIFICATE OF COUNSEL

The appellants herein, by their attorneys, hereby certify that the foregoing motion is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded and proper to be filed herein.

THERON LAMAR CAUDLE,
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FEBRUARY, 1950

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